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Enforcement of Partnership Rights—Who Sues for the Partnership?

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Enforcement of Partnership Rights— Who Sues for the Partnership?*

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I. INTRODUCTION

A. In General

Curiously, the widely adopted Uniform Partnership Act (U.P.A.) of 1914 is silent on a group of issues that are fundamental to partnership law. These issues are the subject of the present Article. They include the capacity of partnerships to sue and be sued as partnerships or entities, and the related matters of whether fewer than all the partners can sue on a partnership right, or be sued on a partnership obligation.

The U.P.A. inspired a grand debate between proponents of the entity and aggregate theories of partnership. On the entity side was Professor Judson A. Crane, a major writer on partnership law.¹ On the aggregate side was Dean William Draper Lewis, the principal drafter of the U.P.A.² The debate focused on the nature of a "legal person" and practical problems of property ownership and creditors' rights. Other than the abstract discussion of "legal person," no serious consideration was given to the capacity of partnerships to sue or be sued or to the procedural problems in the debate.³ The Official Comments to

1. *E.g.*, Crane, *The Uniform Partnership Act—A Critique*, 28 HARV. L. REV. 762 (1915) [hereinafter Crane, *Critique*]; J. CRANE, HANDBOOK OF THE LAW OF PARTNERSHIP (2d ed. 1952).

2. Lewis, *The Uniform Partnership Act—A Reply to Mr. Crane's Criticism*, 29 HARV. L. REV. 158 (1916).

3. Crane mentions among many examples of entity treatment statutes in five states

the U.P.A. fail to mention the issues.⁴

One may speculate on the reasons for the omission of capacity and procedural aspects from the U.P.A. The drafters may have been too preoccupied with property ownership and creditors' rights or with internal partnership questions to be interested in these aspects. Partnerships in the early part of the century may have had so few partners that it seemed easier to expect all partners to be parties to litigation, as the common law generally required. The common law and its exceptions may have seemed adequately clear and efficient. The drafters of the substantive law may have felt they should not deal with procedural questions. They may have believed that the courts should be left to puzzle out the consequences of their expressed preference for the aggregate theory combined with their functional adoption of many entity features in the statute.

B. Enforcement of Partnership Rights

Whatever the drafters' reasons, they did not specify whether partnerships can sue or who can sue for the partnerships. This left the enforcement of a partnership claim or right⁵ in a confusion caused by the combination (and conflict) of entity and aggregate theories of partnership and by the variations in state procedural requirements, some of which reflect one or the other theory.

There are four principal methods, defined by the styles of the lawsuits, that might be used to enforce partnership claims:

- (1) An action by all the partners in their own names: *A, B & C v. D*, or *A, B, & C trading as ABC & Co. v. D*.⁶ This direct suit,

allowing partnerships to sue in the firm name and eight allowing partnerships to be sued in the firm name. Crane, *Critique*, *supra* note 1, at 768-69. Lewis, as an objection to the entity theory, assumes that all partnerships would have to register their names publicly in order for partnerships to be sued in the firm name. Lewis, *supra* note 2, at 167. Later comment on the debate has noted but not plumbed the reasons for the U.P.A.'s failure to deal with suits. See, e.g., Jensen, *Is a Partnership Under the Uniform Partnership Act an Aggregate or an Entity?*, 16 VAND. L. REV. 377, 379, 382-83 (1963).

4. UNIF. PARTNERSHIP ACT § 6, 6 U.L.A. 1, 22-24 (1969).

5. Courts clinging to an extreme version of the aggregate theory of partnership may say or imply that there are no partnership claims, only partners' claims. E.g., McClain v. Buechner, 776 S.W.2d 481, 483 (Mo. Ct. App. 1989). But it is clear that partnerships have claims under the U.P.A. E.g., UNIF. PARTNERSHIP ACT § 9(3)(e), 6 U.L.A. 1, 132 (1969) (unanimous partner consent necessary to "submit a partnership claim . . . to arbitration"). See also *id.* §§ 8, 17, 24, 25, 38(b), 40(a), (h), 41(1), 42, 6 U.L.A. at 115, 207 324, 326, 456, 468-69, 590, 521 (all referring to partnership property).

In speaking of enforcement, this Article uses "right" and "claim" interchangeably though of course a claim becomes a right only when upheld.

6. This latter form is required by P.A. R. CIV. P. 2127 which may be the only rule or statute that deals specifically with the styling of partnership suits.

inherited from the common law, is permitted in almost all states and required in a few. It is discussed in Part II.

- (2) An action by fewer than all the partners in their own names: *A v. D*, or *A & B v. D*. This direct suit, as affected by the U.P.A., is considered in Part III below and, as affected by other criteria, in Part IV below. It is for the benefit of the partnership but somewhat distinct from a derivative suit, discussed in paragraph (3) and Part V below.
- (3) An action by fewer than all the partners in their own names but in behalf of the partnership: *A in behalf of ABC Partnership v. D*, or *A derivatively for ABC Partnership v. D*, or *A in the right of ABC Partnership v. D*. This derivative suit, still in a developing stage, is considered in Part V.
- (4) An action by the partnership as plaintiff, in its own name: *ABC Partnership v. D*. This direct suit, authorized by statute or procedural rule in a number of states and by caselaw in a few, is considered in Part VI below.

The methods, especially the second and third, are not always distinguished in practice and are not easily distinguished in theory. Cutting across the last three methods is the question of who can bring the action and in what circumstances.

It is convenient to discuss these questions in the context of enforcement of partnership claims by lawsuit, since the questions are most likely to arise there and most of the case authority is there. But nonjudicial forms of enforcement, to the extent not covered by the partnership agreement or a partner's agency authority under the U.P.A.⁷ should be governed by the same principles. Nonjudicial forms include foreclosures, repossessions, setoffs or other means of self help. However, the U.P.A.⁸ requires unanimous consent of the partners to submit a partnership claim to arbitration.⁹

Questions of the kind discussed here are raised by third-party defendants—unjustifiably in many if not most situations—by motion to dismiss or for summary judgment for failure to state a claim, for lack of standing, capacity, authority, joinder, jurisdiction or real party in interest. They are also raised by the partners who did not initiate the action (*e.g.*, following their motion to intervene). In some of the more heated contests, those partners are defendants or among the defend-

7. UNIF. PARTNERSHIP ACT § 9(1), 6 U.L.A. 1, 132 (1969). Section 9(1) is discussed at length in A. BROMBERG & L. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP §§ 4.01-.04 (1988).

8. UNIF. PARTNERSHIP ACT § 9(3)(a), 6 U.L.A. 1, 132 (1969).

9. *Id.* § 9(3)(e), 6 U.L.A. at 132. REV. UNIF. PARTNERSHIP ACT § 301 (Discussion Draft 1991) would eliminate the requirement of unanimous consent for arbitration and thus facilitate alternative dispute resolution in accordance with current preferences. See *id.* § 301 comment.

ants. In situations of this sort, the courts may reach different results, as noted in Parts IV and V below.

Sharply different policies apply to enforcement objections by non-initiating partners and by third-party defendants. Noninitiating partners are properly concerned with efficient use of partnership resources in the enforcement effort—will it be unduly costly relative to the probable return or unduly distractive from partnership operations—and with other possible consequences—will business relations or reputations be harmed. Third-party defendants are naturally concerned with avoiding liability. But their only properly cognizable concern is avoiding multiple suits on the same claims. This concern is satisfied if the first suit has preclusive effect. Part II below examines this question and concludes that preclusive effect is normally the result.¹⁰ Consequently, there will be little or no justification for recognizing a third-party defendant's objection that fewer than all the partners are trying to enforce the partnership claim. Nonetheless, for completeness, I will consider the objections third parties have made.

The federal courts determine capacity to sue or be sued in partnership cases by the law of the state in which the court sits except that in federal question (as opposed to diversity) cases, partnerships may sue and be sued in their common names.¹¹

This Article considers only enforcement of claims of general partnerships. Enforcement of claims of limited partnerships raises similar issues with respect to the general partners but is not considered here. A critique of the whole untidy area of enforcement of partnership rights appears in Part VII below.

II. ENFORCEMENT OF PARTNERSHIP RIGHTS BY ALL PARTNERS

A. In General

This Part deals with the enforcement of partnership rights by all the partners together, which was the common law practice. It is sufficient almost everywhere and necessary in a relatively small number of states. Its rationale is considered below along with the preclusive effect of enforcement by fewer than all the partners.¹²

10. See *infra* section II.D.

11. FED. R. CIV. P. 17(b). See, e.g., *Caliber Partners, Ltd. v. Affeld*, 583 F. Supp. 1308, 1313-14 (N.D. Ill. 1984) (limited partnerships have capacity to sue on federal securities claims but not on pendent state law claims for which Illinois law controls); *Decker Coal Co. v. Commonwealth Edison Co.*, 110 Mont. 251, 714 P.2d 155 (1986) (construing local law on a certified question from the Ninth Circuit).

12. See *infra* section II.D.

B. Sufficiency of All Partners

All partners together *can* enforce a partnership right in virtually every jurisdiction in the United States.¹³ This follows from any or all of several sources: (1) their management rights which can be exercised unanimously even in extraordinary matters;¹⁴ (2) their authority as agents of the partnership;¹⁵ (3) their co-ownership of partnership property (which includes a claim against a third party);¹⁶ and (4) their broad ability to deal with it by unanimous agreement.¹⁷ The result is generally the same whether entity or aggregate theory prevails.¹⁸

C. Necessity of All Partners

As at common law, in some states such as Florida, Illinois and Missouri, all partners *must* act together (*i.e.*, all must sue to enforce a partnership right).¹⁹ These states typically adhere to the aggregate theory of partnership under which the claims belong to the partners jointly rather than to the partnership. The partners are all considered indispensable or necessary parties.²⁰ Without a statute or rule to the contrary, all must sue on the claim.²¹ Joinder of all partners is often stated to be the requirement for contract claims²² but it is extended to

13. *See, e.g.*, *Baron v. Lerman*, 719 S.W.2d 72 (Mo. App. 1986)(the court notes but does not rule on the defendants' claim that the plaintiffs failed to prove that all partners were plaintiffs; the implication is that plaintiffs need not prove this but that defendants may disprove it); *Deal Farms, Inc. v. Farm & Ranch Supply, Inc.*, 382 So. 2d 888 (Fla. Dist. Ct. App. 1980)(both joint venturers may sue defendant although defendant dealt with only one of them and did not know of joint venture).

14. UNIF. PARTNERSHIP ACT §§ 9(1), 18(e), (h), 6 U.L.A. 1, 132, 213 (1969).

15. *Id.* §§ 6(1), 25, 6 U.L.A. at 22, 326.

16. *Id.* § 9(1), 6 U.L.A. at 132.

17. *Id.* §§ 6(1), 25, 6 U.L.A. at 25, 326.

18. However, a strong adherence to entity theory, as in Louisiana, may lead to the conclusion that only the partnership can enforce its right.

19. *See infra* notes 20 & 21.

20. Where the partners have changed, it is the partners at the time of the transactions underlying the claim that must be joined according to *Smith v. Smith, Barney, Harris, Upham & Co.*, 505 F. Supp. 1380, 1383 (W.D. Mo. 1981).

21. RESTATEMENT (SECOND) OF CONTRACTS § 298(1)(1979)(unless all joint obligees are joined as plaintiffs or defendants, promisor can by appropriate objection prevent recovery of judgment). *But cf. id.* § 298(2)(unless limited by agreement, any joint obligee can sue in the name of all joint obligees for enforcement by money judgment). *Semble*, *Henson v. First Sec. & Loan Co.*, 2 P.2d 85 (Wash. 1931). It is not always clear from the reported decisions whether it is sufficient that all partners are named as plaintiffs even though they are not active in the suit.

22. *See Harrell & Sumner Contracting Co. v. Peabody Petersen Co.*, 546 F.2d 1227, 1229 (5th Cir. 1977)(joint venturer is indispensable party a matter of federal law, at least for diversity purposes); *Purcel v. Wells*, 236 F.2d 469, 472 (10th Cir. 1956)(applying Oklahoma and Texas law); *Robb Container Corp. v. Sho-Me Co.*, 566 F. Supp. 1143, 1156 (N.D. Ill. 1983)(applying Illinois law; contract, unfair com-

other claims as well.²³

D. Rationales; Preclusive Effect of Enforcement by Fewer Than All Partners

The main rationale given by the courts (and defendants) for requiring all partners to sue is that this will protect the defendant from multiple suits.²⁴ The rationale is weak since the plaintiff partner's suit on a partnership claim should preclude other suits on the same claim.²⁵ "The partnership will be bound by the act of the single partner in bringing suit and any recovery will discharge the partnership's claim

petition and antitrust claims); *Aronovitz v. Stein Properties*, 322 So. 2d 74, 76 (Fla. Dist. Ct. App. 1975)(each partner has an interest in the contract); *Johnson v. Kentucky Youth Research Center, Inc.*, 682 S.W.2d 799 (Ky. Ct. App. 1985); *American Central Ry. Co. v. Miles*, 52 Ill. 174, 178 (1869)(citing pre-U.P.A. authority); *Karp v. Coolview of Wis., Inc.*, 25 Wis. 2d 299, 302, 130 N.W.2d 790, 794 (1964)(partners are indispensable; nonjoinder may be raised whenever court has jurisdiction).

23. See, e.g., *Zion v. Sentry Safety Control Corp.*, 258 F.2d 31, 34 (3d Cir. 1958)(applying Pennsylvania law; claim for compensation for services by lawyers); *Excalibur Oil, Inc. v. Sullivan*, 659 F. Supp. 1539, 1540 n.1 (N.D. Ill. 1987)(applying Illinois law; dictum; nature of claim not stated); *Robb Container Corp. v. Sho-Me Co.*, 566 F. Supp. 1143, 1156 (N.D. Ill. 1983)(Illinois law); *McClain v. Buechner*, 776 S.W.2d 481, 486 (Mo. Ct. App. 1989)(legal malpractice claim); *N.E.&R. Partnership v. Stone*, 745 S.W.2d 266, 267 (Mo. Ct. App. 1988)(nature of claim not stated; general partnership X as general partner of limited partnership Y could sue for limited partnership Y only by naming all general partners of X as plaintiffs); *Allgeier, Martin & Assocs. v. Ashmore*, 508 S.W.2d 524, 525 (Mo. Ct. App. 1974)(claim for reasonable value of work and services; "generally, all partners are necessary parties-plaintiff to enforce an obligation due the partnership").
24. E.g., *Smith v. Smith, Barney, Harris, Upham & Co.*, 505 F. Supp. 1380, 1383 (W.D. Mo. 1981); *DeToro v. Dervan Inv. Ltd. Corp.*, 483 So. 2d 717, 721 (Fla. Dist. Ct. App. 1986); *Spiritas v. Robinowitz*, 544 S.W.2d 710, 715 (Tex. Civ. App. 1976).

Other rationales are even less convincing. One rationale asserted is that a partner can release a claim and moot another partner's suit. See *McClain v. Buechner*, 776 S.W.2d 481, 483 (Mo. Ct. App. 1989). It is true that a partner can release a partnership claim pursuant to actual or apparent authority under UNIF. PARTNERSHIP ACT § 9(1), 6 U.L.A. 1, 132 (1969), and that a joint obligee generally can release the joint obligation. RESTATEMENT (SECOND) OF CONTRACTS § 299 (1979). But this is more a reason to permit a partner to enforce a claim, which may benefit the partnership, than to deny the partner a right to enforce the claim, which may hurt the partnership.

A second rationale for the requirement of all partners is that an obligation to a partnership makes the partners co-obligees; allowing one partner to enforce it changes the obligation from joint to several. See *McClain v. Buechner*, 776 S.W.2d 481, 483 (Mo. Ct. App. 1988). Assuming such a change is important, it is hard to see how a suit to enforce in behalf of the partnership or in behalf of all the partners makes that change.

25. Preclusive effect assumes that the suit goes to final judgment. See generally *F. JAMES & G. HAZARD, CIVIL PROCEDURE* § 11.4 (1985); RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980). Settlement or compromise will normally be preclusive too.

against the defendants."²⁶

Preclusive effect is justified in most cases by the plaintiff partner's actual or apparent authority to litigate a partnership claim. This result is reinforced by the doctrines of res judicata and collateral estoppel, coupled with the privity—recognized in a number of jurisdictions—between the partners and the partnership and among the partners. A recovery by one partner will preclude a later suit by a copartner or the partnership.²⁷ The same doctrines operate if the partner loses: the copartners and partnership are barred from suing again.²⁸ Due process considerations ought to be satisfied by the plaintiff partner's representative capacity,²⁹ by the knowledge of the suit

26. *Leh v. General Petroleum Corp.*, 165 F. Supp. 933, 937 (S.D. Cal. 1958) (partnership had dissolved and was winding up). *Leh* was noted in *Recent Cases—Federal Courts—Authority of State Law—One of Two General Partners Allowed to Bring Suit Under Clayton Act in Contravention of State Law*, 73 HARV. L. REV. 411 (1959). See also F. JAMES & G. HAZARD, CIVIL PROCEDURE § 11.29, at 646 (1985). The partner will hold in trust for the partnership any recovery. UNIF. PARTNERSHIP ACT § 21(1), 6 U.L.A. 1, 258 (1969).

27. *Schoenborn v. Williams*, 272 P. 992, 994 (Mont. 1928) (stated as rationale for allowing partner to sue for entire partnership claim rather than only his half; claim for impounded proceeds of sale of partnership cattle); *Murry v. Eighth Ave. R.R. Co.*, 120 Misc. 784, 199 N.Y.S. 716 (N.Y. App. Term. 1923) (partner's prior recovery is res judicata of suit by partner and copartner which is in effect suit by partnership; tort claim for injury to partnership horse and truck); RESTATEMENT (SECOND) OF JUDGMENTS § 60(2)(b) (1980).

28. *Smith v. Jenkins*, 562 A.2d 610, 616 (D.C. App. 1989) (judgment against general partner in prior suit bars suit by limited partners on same claim); *Cole v. Kunzler*, 115 Idaho 552, 555-57, 768 P.2d 815, 818-20 (Idaho Ct. App. 1989) (judgment against liquidating partner (apparently suing for partnership) in prior proceeding bars suit by partner and copartner doing business as partnership on same claim); *Feinberg v. Stasilitis*, 118 A. 694 (N.J. 1922) (judgment against partner in prior suit bars suit by partnership on substantially the same claim); *Grimm v. Rizk*, 640 S.W.2d 711, 716 (Tex. Ct. App. 1982) (judgment against partner, who was also trustee for partners or partnership, in prior suit bars suit by copartners), *cert. denied*, 464 U.S. 1045 (1984); RESTATEMENT (SECOND) OF JUDGMENTS § 60(2)(a) (1980).

See *Hammonds v. Holmes*, 559 S.W.2d 345, 347 (Tex. 1977) (dismissal of prior suit with prejudice at request of plaintiffs barred later suit by same plaintiffs doing business as partnership); *Leh v. General Petroleum Corp.*, 165 F. Supp. 933, 937 (S.D. Cal. 1958) (judgment for costs against partner will bind partnership assets and at least the assets of the plaintiff partner). But see *Pate v. George P. Wyly & Co.*, 118 Ga. 262, 264, 45 So. 217, 218 (1903) (judgment against partner individually not conclusive as to partnership which was not a party to the suit); *Figarra v. Saitta*, 91 N.Y.S. 728 (N.Y. App. Term. 1905) (judgment for defendant in suit by partner individually does not bar suit against defendant by partnership's assignee on same claim). Somewhat different considerations may prevail in the application of res judicata, collateral estoppel and privity to partners and partnerships as defendants. See Annotation, *Judgment for or Against Partner as Res Judicata in Favor of or Against Copartner not a Party to the Judgment*, 11 A.L.R.2d 847 (1950).

29. See, e.g., *Hammonds v. Holmes*, 559 S.W.2d 345, 347 (Tex. 1977); *Grimm v. Rizk*, 640 S.W.2d 711, 716 (Tex. Ct. App. 1982), *cert. denied*, 464 U.S. 1045 (1984).

attributed from the plaintiff partner to the partnership³⁰ and (by implication) to the copartners,³¹ and by their opportunity to intervene.³² Nonetheless, courts have occasionally permitted second suits by copartners.³³

A variant and somewhat more cogent (and traditional) rationale offered by the courts (and defendants) is that requiring all partners to sue will conserve judicial resources.³⁴ Later suits by different partners, even if subject to dismissal or other summary disposition, would consume some court time.

From the viewpoint of the nonjoining partners and the partnership, there are several reasons for requiring all the partners—or at least more than one—to sue. The suit may be a poor use of partnership resources; for example, if the claim is weak, the time and money costs of enforcement may be high, or the chances of collecting a judgment or settlement may be small. Enforcement of the claim may harm the partnership's business relations with the defendant or with others. The plaintiff partner's choice of counsel or method of handling the suit may not satisfy the other partners. Moreover, the suit may lead to counterclaims against the partnership for which all partners are personally liable.³⁵ However, these are similar to other risks of shared management which partners normally assume in a partnership.

Court opinions requiring all partners to sue typically do not consider the relevance of the U.P.A.³⁶ because they assume that it has no relevance.³⁷ As Part III shows, the U.P.A. is relevant and should be used as a guide.

Unanimous enforcement by partners is often impractical; for example, the partners may be numerous, or scattered, or in disagreement about enforcement of the right. Thus it is important to analyze

30. UNIF. PARTNERSHIP ACT § 12, 6 U.L.A. 1, 160 (1969).

31. *Grimm v. Rizk*, 640 S.W.2d 711, 716 (Tex. Ct. App. 1982)(section 12 of the U.P.A. "contemplates that a partnership as a whole is charged with knowledge of or notice to a partner"), *cert. denied*, 464 U.S. 1045 (1984). It is important that the other partners be aware of the enforcement effort for at least two reasons. This may be necessary for due process in order for res judicata or collateral estoppel to operate and prevent later suits by other partners. It is also appropriate, if not necessary, to allow partnership governance or management provisions to operate.

32. For example, this would be the case under rules similar to FED. R. CIV. P. 24.

33. See *Figarra v. Saitta*, 91 N.Y.S. 728 (N.Y. App. Term. 1905); *Pate v. George P. Wyly & Co.*, 118 Ga. 262, 45 So. 217 (1903). For a synopsis of these cases, see note 28 above.

34. *Pine Prods. Corp. v. United States*, 15 Cl. Ct. 11, 14 (1988).

35. See *Cates v. International Tel. & Tel. Corp.*, 756 F.2d 1161, 1179 (5th Cir. 1985)(applying Texas law), *cert. denied*, 486 U.S. 1055 (1988).

36. See *Aronovitz v. Stein Properties*, 322 So. 2d 74 (Fla. Dist. Ct. App. 1975).

37. See *Allgeier, Martin & Assocs. v. Ashmore*, 508 S.W.2d 524 (Mo. Ct. App. 1974).

the exceptions to the unanimity requirement. These are discussed in Parts III to IV.

III. ENFORCEMENT OF PARTNERSHIP RIGHTS BY FEWER THAN ALL PARTNERS—UNIFORM PARTNERSHIP ACT CRITERIA

A. In General

Part II above narrates the need for all partners to enforce partnership rights or claims in some states. This Part discusses the U.P.A.'s provisions that offer guidance on enforcement of partnership claims by fewer than all the partners. Other bases on which fewer than all the partners may be permitted to enforce partnership claims are analyzed in Part V.

The U.P.A. does not deal explicitly with the enforcement of a partnership's claims. Perhaps for this reason the courts rarely apply the U.P.A.'s provisions to decide whether fewer than all the partners may sue on a partnership claim. Nonetheless, several sections are relevant,³⁸ provide reasonable guides and should be considered. These provisions are discussed in the remaining sections of Part III. However, these provisions may lead to different results—ranging from individual action through majority action to unanimous action—depending on which is deemed controlling and whether a partner or a nonpartner is raising the issue, and perhaps depending on the nature of the partnership. Thus, the immediately following sections of Part III assume that there is no partnership agreement in point;³⁹ the final section of Part III considers the effect of an agreement.⁴⁰ Part VII of the Article reconciles the provisions and shows their best combined effect.

A defendant may use a variety of ways to challenge a partnership suit brought by fewer than all the partners. Depending on the applicable procedural rules, the methods may include motions to dismiss or for summary judgment based on lack of standing, capacity, authority, joinder, jurisdiction or real party in interest.

If fewer than all the partners succeed in enforcing a partnership right, they hold in trust for the partnership any recovery, or must account to the partnership for it, unless the other partners consent.⁴¹

B. Equal Management Rights

The enforcement of a partnership's rights in contract, tort, owner-

38. *Cates v. International Tel. & Tel. Corp.*, 756 F.2d 1161, 1176-77 (5th Cir. 1985)(applying Texas law), *cert. denied*, 486 U.S. 1055 (1988).

39. See *infra* text accompanying notes 42-71.

40. See *infra* section III.F.

41. UNIF. PARTNERSHIP ACT § 21(1), 6 U.L.A. 1, 258 (1969).

ship or otherwise is an aspect of the management and conduct of the partnership business. Consequently all partners "have equal rights" in enforcement under the U.P.A.⁴² Section 18(e) can be reasonably read to mean that any partner can enforce a partnership obligation:

Each partner has the power to use ordinary legal process to enforce obligations owed the partnership and therefore may engage counsel to sue on behalf of the firm If the law were otherwise, valuable rights might be lost by failure to sue (for example) within a statutory period or to plead certain defenses.⁴³

On the other hand, section 18(e) can be read to mean that a partner can enforce a partnership obligation only if no other partner objects. Or, section 18(e) can be regarded as limited only by section 18(h),⁴⁴ discussed in the following section.⁴⁵ Of the three readings, the second is inappropriate since the statutory tone is more a grant of power or authority than one of limitation.⁴⁶ Limitation is the tone of section 18(h), discussed in the next section. The choice between the first and third readings is effectively made in Part VII below after consideration of the other pertinent sections.

C. Majority Rule for Ordinary Matters on Which There Is Disagreement

The enforcement of the partnership right is a "matter connected with the partnership business" in the language of the U.P.A.⁴⁷ If it is considered "an *ordinary* matter connected with the partnership business" on which there is disagreement among the partners, it "may be decided by a majority of the partners." "May" apparently means "must"⁴⁸ whenever the partners make a decision. If read literally as "may" in any other situation, it would tell us little or nothing since the

42. *Id.* § 18(e), 6 U.L.A. at 213. The complications of this section are discussed in A. BROMBERG & L. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 6.03 (1988).

43. *Thompson Door Co. v. Haven Fund*, 351 A.2d 864, 865 (Del. 1976) (contract breach claim). This ruling appears to be general and is probably intended to be. But it may be qualified by the fact that the defendants were corporations with which the copartners were affiliated as officers. The clause omitted from the quote in the text is "that rule is particularly significant, and necessary, when a majority of the general partners has a divided interest." *Id.* This aspect is considered further in section IV.B below. The suit was brought in the partnership name under a statute explicitly permitting that.

44. *Lane v. Krein*, 297 S.C. 13, 375 S.E.2d 351 (S.C. Ct. App. 1988). See *infra* note 49 (summarizing the case).

45. See *infra* section III.C.

46. In addition, a veto power in a single partner is in essence a unanimity rule which would impose substantial costs because of the inevitability of disagreement.

47. UNIF. PARTNERSHIP ACT § 18(h), 6 U.L.A. 1, 213-14 (1969).

48. See *Summers v. Dooley*, 94 Idaho 87, 481 P.2d 318, 320 (1971) (section 18(h) of the U.P.A. is mandatory, not permissive). The "may" clearly means that the decision need not be unanimous.

preamble to section 18 of the U.P.A. states that everything in the section is subject to agreement among the partners.

Under this majority rule principle a partner cannot maintain a suit to enforce a partnership claim if a majority of the partners disagree with the enforcement.⁴⁹ The disagreement should be manifested early in the suit (otherwise waived). This presupposes that partners are informed of the suit. There are indications of the stricter view that a partner cannot maintain a suit to enforce a partnership right unless a majority of the partners affirmatively agree to the enforcement.⁵⁰ This stricter view is inconsistent with section 18(h) which im-

49. See *Hauer v. Bankers Trust of N.Y. Corp.*, 65 F.R.D. 1 (E.D. Wis. 1974) (Wisconsin law; federal antitrust, state contract and fiduciary breach and other claims). In *Hauer* the partnership agreement stated that "[a] majority of the managing partners shall be authorized . . . to determine all questions relating to the conduct and management of the partnership business, and the determination of a majority of the managing partners on any such question . . . shall be binding." *Id.* at 4. Two of the three managing partners objected to the suit filed by the third on behalf of the partnership. The suit was dismissed for lack of plaintiff's capacity to assert claims for the partnership.

See also *Lane v. Krein*, 375 S.E.2d 351 (S.C. Ct. App. 1988) (conversion claim). In *Lane* the partnership agreement gave each partner an equal voice in management. One partner sued, naming third parties and the other three partners as defendants and conspirators in the conversion. The three partners denied that the partnership had authorized suit. Treating the partnership as an entity governed by majority rule in event of disagreement, the court affirmed dismissal of the conversion claim for lack of plaintiff's capacity to sue. The court noted that plaintiff had a remedy in accounting against the three partners.

See *Coast v. Hunt Oil Co.*, 195 F.2d 870 (5th Cir. 1952) (applying Louisiana law; 49% partner cannot enforce partnership antitrust claim when 51% partner refuses to join; only partnership can enforce under Louisiana entity theory).

50. One court has said:

Indeed, the general rule seems to be that even a single partner, at least absent the consent of a majority of the partners, may not ordinarily [sue on a partnership] cause of action as a whole, whether in the name of the partnership or in his own name, or for the fractional share of such a cause of action corresponding to his fractional interest in the partnership.

Cates v. International Tel. & Tel. Corp., 756 F.2d 1161, 1176 (5th Cir. 1985), cert. denied, 486 U.S. 1055 (1988). The court did not so hold. Rather, it indicated that the executrix of a dead partner—a *fortiori* a partner—might enforce a partnership claim or his or her fraction of it in exceptional circumstances, discussed in sections IV.B and V.C below. The partnerships formed and administered group insurance trusts for employers. The suit was against the insurer and reinsurer for damage to the partnerships through contract breach (e.g., by failing to pay claims properly, failing to market programs in good faith, unreasonably raising rates and forcing the partnerships improperly to pay taxes) and for antitrust violations restricting competition by the partnerships and attempting to destroy them.

See also *Noguera v. Maisel & Assocs. of Mich.*, 147 Mich. App. 119, 124, 369 N.W.2d 492, 498-99 (1985). A partner could not maintain a usury claim against the managing partner for its loans to the partnership since the partner was not a borrower (even though he was jointly liable for the loan). "[A]ny attempt to

poses majority rule for an ordinary matter only if there is partner disagreement. There appears to be no need for all members of the required majority to be parties plaintiff; it is sufficient if their consent is demonstrated.⁵¹

Section 18(h) of the U.P.A. implies that if enforcement of the right is an ordinary matter and there is no disagreement among the partners, any partner can enforce the right. If the other partners are indifferent, the suing partner may proceed. This is consistent with the first reading of section 18(e) given in the preceding section (*i.e.*, any partner can enforce a partnership obligation).

Section 18(h) implies that if enforcement of the right is not an "ordinary matter," and there is disagreement among the partners, something more than majority decision is required.⁵² Unanimity is the logical alternative, although other answers may be possible based on the partners' expectations. Unanimity is the alternative chosen by the courts.⁵³

It is hard to generalize about when a matter will be more than "ordinary." An "ordinary matter" can reasonably be equated to a matter "for apparently carrying on in the usual way the business of the partnership"—the language used in section 9(1) of the U.P.A. to describe the scope of a partner's authority to bind the partnership. This aspect is discussed below.⁵⁴ Since litigation is almost commonplace in the United States, enforcement of a partnership's claim will often be an ordinary matter and subject to section 18(h) of the U.P.A.

A possible example of an extraordinary matter in the present context is an enforcement that is likely to be very costly in relation to the value obtained if it is successful. A claim against one or more of the partners probably should not be considered an ordinary matter.⁵⁵ It

avoid repayment based on usury claims would also be a matter of majority control." *Id.* The remaining partners disagreed with other parts of the suit and may have disagreed with this part. So it is not clear whether the court is requiring that a majority approve the claim or only that they not object to it.

51. See *Miller v. Stout*, 706 S.W.2d 785, 787 (Tex. Ct. App. 1986)(error to exclude evidence of consent of another partner whose interest plus the plaintiffs' would have exceeded the two-thirds required by the partnership agreement).

52. Proposed section 401(j) of the Revised Uniform Partnership Act makes explicit the implication in section 18(h) of the U.P.A. The Revised Act provides: "No act outside the ordinary course of partnership business . . . may be undertaken right-fully without the consent of all the partners." REV. UNIF. PARTNERSHIP ACT § 401(j)(Discussion Draft 1991). But, to preserve the ability of persons dealing with the partnership to rely on apparent authority, section 401(j) of the Revised Act adds: "This section does not limit the obligations of the partnership to third parties under Section 301."

53. See *supra* notes 24-35 and accompanying text.

54. See *infra* section III.E.

55. *Lane v. Krein*, 375 S.E.2d 351 (S.C. Ct. App. 1988), treated a suit against third parties and three partners as an ordinary matter to be decided by majority rule. But the court had no occasion to consider a unanimity requirement since the

should be treated as described below.⁵⁶

There are equitable reasons to apply the majority or unanimity requirements only to the disinterested partners when some partners have a conflict of interest as to the enforcement—as opposed to a disagreement about the wisdom of enforcement.

D. Use of Partnership Property

A partnership claim or cause of action is partnership property⁵⁷ and does not belong to any partner individually. A partner cannot sue in his or her own name to enforce a partnership claim individually (i.e., to keep the recovery personally).⁵⁸ For the same reason, it is usually held that a partner cannot individually enforce a fraction of a partnership claim any more than he or she can individually enforce the entire claim. Thus a one-third partner cannot sue for one-third of a partnership claim.⁵⁹

three partners were a majority and sufficient to stop the suit under majority rule. See *supra* note 49 (summarizing the case).

56. See *infra* section IV.B.

57. See UNIF. PARTNERSHIP ACT § 8, 6 U.L.A. 1, 115 (1969).

58. *Heinz v. Simon & Flynn, Inc.*, 444 F. Supp. 114 (S.D.N.Y. 1978) (applying New York law to a conversion claim of joint venture); *Stephen v. Phillips*, 101 N.M. 790, 793, 689 P.2d 939, 941-43 (N.M. Ct. App. 1984) (partner not entitled to individual damages for conversion of partnership property); *Kirschbaum v. Merchants Bank of N.Y.*, 272 A.D. 336, 336, 71 N.Y.S.2d 79, 80 (N.Y. App. Div. 1947) (debt due partnership; partner must sue for partnership); *Godwin v. Vinson*, 251 N.C. 326, 111 S.E.2d 180 (1959) (collection of loan).

59. See *Cates v. International Tel. & Tel. Corp.*, 756 F.2d 1161, 1176 (5th Cir. 1985) (applying Texas law), *cert. denied*, 486 U.S. 1055 (1988); *Coast v. Hunt Oil Co.*, 195 F.2d 870 (5th Cir.) (applying Louisiana law; 49% partner cannot sue for 49% of antitrust claim), *cert. denied*, 344 U.S. 836 (1952); *Pine Prods. Corp. v. United States*, 15 Ct. Cl. 11, 14 (1988) (claim for refund of overpayment to government by joint venture); *Stevens v. St. Joseph's Hosp.*, 52 A.D.2d 722, 381 N.Y.S.2d 927 (1976) (contract breach claim); *Ruzicka v. Rager*, 305 N.Y. 191, 197, 111 N.E.2d 878, 881 (N.Y. 1953) ("[A] member of a partnership may not recover upon a partnership obligation individually."); *Kemp v. Murray*, 680 P.2d 758 (Utah 1984). See also *Credit Francais Int'l v. Sociedad Financiera de Comercio*, 128 Misc. 2d 564, 575-78, 490 N.Y.S.2d 670, 681-84 (N.Y. Sup. Ct. 1985) (bank which deposited \$3,000,000 in bank pool of \$25,000,000 with common agent for loan to defendant could not sue for nonpayment of its \$3,000,000 part; bank pool considered to be a joint venture).

But see *Cates v. International Tel. & Tel. Corp.*, 756 F.2d 1180, 1183 (5th Cir. 1985) (indicating that a fractional claim might be allowed where controlling partners conspired with defendant to injure the partnership and prevent a suit), *cert. denied*, 486 U.S. 1055 (1988); *Leff v. Gunter*, 33 Cal. 3d 3, 189 Cal. Rptr. 377, 658 P.2d 740 (1983). In *Leff* a one-sixth partner (joint venturer) was allowed to sue a copartner and win his one-sixth of the lost profit from the copartner's fiduciary breach, although the third partner chose not to sue. The copartner bid for and obtained a construction contract on which other partners were bidding for the partnership. The *Leff* court did not discuss the right to sue on what appears to be a partnership claim.

On the other hand, each partner is co-owner of partnership property as tenant-in-partnership within the strictures of the U.P.A.⁶⁰ The right to "possess" partnership property for partnership purposes can reasonably be construed to permit any partner to enforce a partnership right in the interest of the partnership.⁶¹ This can take the form of a derivative suit, discussed in Part V below, or any other suit in which the partner represents the partnership and holds for the partnership any recovery.⁶² A partner's interest in a partnership right or claim is sufficient to satisfy procedural rules⁶³ that require suits to be brought by real parties in interest.

E. Partner Authority

If the enforcement is considered to be carrying on the business of the partnership in the usual way (*i.e.*, equivalent to an ordinary matter under section 18(h) of the U.P.A.), any partner can bind the partnership to third-party defendants by a complaint or other act to enforce the right.⁶⁴ "[I]t is within the implied power of a partner to institute ordinary legal proceedings in behalf of a firm by using the names of all the parties as such as plaintiffs for the enforcement of the rights of the firm."⁶⁵

What is "apparently . . . usual" may take into account the partnership's prior acts as well as the acts of similar partnerships.⁶⁶ As noted above,⁶⁷ the commonplace nature of litigation in the United States

60. UNIF. PARTNERSHIP ACT § 25, 6 U.L.A. 1, 326 (1969).

61. *Stephen v. Phillips*, 101 N.M. 790, 689 P.2d 939 (Ct. App. 1984), so implies, but rejects the suit (for conversion of partnership property) because the suit was not in behalf of the partnership and the plaintiff testified the property was his, not the partnership's.

A related argument was made and rejected in *Cates v. International Tel. & Tel. Corp.*, 756 F.2d 1161, 1177 n.26 (5th Cir. 1985), *cert. denied*, 486 U.S. 1055 (1988). The suing partner claimed the right to sue because the partnerships were his "alter ego." The court doubted that the argument was valid even if factually established, noting that the partner was not even a majority owner.

62. See UNIF. PARTNERSHIP ACT § 21(1), 6 U.L.A. 1, 258 (1969), which generally requires a partner to account to the partnership for any benefit derived by him or her from a partnership-connected transaction.

63. *E.g.*, FED. R. CIV. P. 17(a). See generally F. JAMES & G. HAZARD, CIVIL PROCEDURE §§ 10.3, 10.6 (1985).

64. A suit will ordinarily be in the scope of the partnership business if the partnership frequently sues (*e.g.*, a landlord or a loan company). However, given the frequency and breadth of litigation in the United States, filing a suit may be "apparently . . . usual" in many other kinds of business.

65. *Henson v. First Sec. & Loan Co.*, 2 P.2d 85 (Wash. 1931).

66. REV. UNIF. PARTNERSHIP ACT § 301(b) (Discussion Draft 1991) would codify this in the language "for apparently carrying on in the usual way the partnership business or business of the kind carried on by the partnership."

67. See *supra* section III.C.

makes it likely that enforcement of claims will be ordinary for many partnerships.

If the enforcement act is not "apparently . . . usual," it is not binding on the partnership unless "authorized by the other partners."⁶⁸ The "other partners" may, by the standard form agreement of section 18(h) of the U.P.A. or the particular partnership agreement, delegate enforcement authority to one or a majority or any other number of the partners. Section 9(2) of the U.P.A. does not specify whether "the other partners" means all the other partners or only enough other partners to satisfy the agreement, discussed below,⁶⁹ or enough to satisfy the majority rule provision of section 18(h) of the U.P.A., discussed above.⁷⁰ In contrast, section 9(3) of the U.P.A. specifies that all partners must approve certain acts, including submission of a partnership claim to arbitration. Section 9(3) implies that something less than unanimity suffices to file a lawsuit to enforce a partnership claim. On the other hand, "the other partners" in section 9(2) suggests all other partners. An act that is not "apparently . . . usual" is arguably not an ordinary matter for which a majority is sufficient under the U.P.A.⁷¹ Section 9(1) of the U.P.A., then, is inconclusive if enforcement is not "apparently . . . usual." Of the possible implications, the more practical and reasonable is that, as to third-party defendants, majority rule prevails for enforcement which is not "apparently . . . usual" and any partner has authority for enforcement which is "apparently . . . usual."

F. Effect of Partnership Agreement

All the provisions discussed in the preceding sections can be varied by agreement among the partners.⁷² The agreement can effectively determine whether fewer than all the partners may enforce a partnership claim.⁷³ An agreement designating a person as managing partner may authorize that partner to sue for the partnership if his or her powers are stated explicitly enough or broadly enough to include litigation of partnership claims. The agreement might be that litigation

68. UNIF. PARTNERSHIP ACT § 9(2), 6 U.L.A. 1, 132 (1969).

69. See *infra* section III.F.

70. See *supra* section III.C.

71. REV. UNIF. PARTNERSHIP ACT § 301(c) (Discussion Draft 1991) states that "[a]n act of a partner which is not apparently for carrying on the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners."

72. UNIF. PARTNERSHIP ACT §§ 9(1), (2), (4), 18, 25(2)(a), 6 U.L.A. 1, 132-33, 213-14, 326 (1969).

73. *E.g.*, *Miller v. Stout*, 706 S.W.2d 785, 786-87 (Tex. Ct. App. 1986) (joint venture agreement provided that two-thirds in interest of the venturers would be required to "take any other action" with certain exceptions which did not refer to filing suit; held, 50% in interest could maintain suit in venture name with approval of a 25% interest; no individual venturer need be a party to the suit).

requires unanimous or majority consent, or approval of designated partners. The agreement, among other things, may prescribe voting other than by simple majority, or voting rights in proportion to profit or capital interests or other methods besides "one-partner-one-vote." Other aspects of drafting the partnership agreement to deal with enforcement of partnership rights will be considered below.⁷⁴

No act in contravention of an agreement among the partners may be done rightfully without unanimous consent.⁷⁵ If the partners have agreed to enforce (or not to enforce) a partnership right, that agreement can be altered only by unanimous consent.⁷⁶ For the purpose of obtaining such consent it is possible to exclude partners who have a conflict of interest.⁷⁷

IV. ENFORCEMENT OF PARTNERSHIP RIGHTS BY FEWER THAN ALL PARTNERS—OTHER CRITERIA

A. In General

Apart from the U.P.A.'s guidance discussed in Part III, there are several other bases on which courts have permitted fewer than all the partners to enforce a partnership right or claim. One basis is conflict of interest by partners not joining in the enforcement. Part IV first considers conflict of interest.⁷⁸ It then discusses other criteria for enforcement by fewer than all the partners.⁷⁹ Finally, for context, enforcement by individual partners of individual claims related to the partnership is noted.⁸⁰

As was stated above,⁸¹ if fewer than all the partners succeed in enforcing a partnership right, they hold in trust for the partnership any recovery, or must account to the partnership for it, unless the other partners consent.⁸²

74. See *infra* section VII.E.

75. Cf. *Hauer v. Bankers Trust of N.Y. Corp.*, 65 F.R.D. 1 (E.D. Wis. 1974). Proposed REV. UNIF. PARTNERSHIP ACT § 401(j)(Discussion Draft 1991) would replace "no act in contravention" with the following: "No act outside the ordinary course of partnership business . . . may be undertaken rightfully without the consent of all of the partners."

76. This argument was made in *Cates v. International Tel. & Tel. Corp.*, 756 F.2d 1161, 1164, 1173 (5th Cir. 1985), *cert. denied*, 486 U.S. 1055 (1988). But it was not decided because the partner who filed suit for the partnership died. Control of the suit then passed, as partnership property, to the surviving partners under UNIF. PARTNERSHIP ACT § 25(2), 6 U.L.A. 1, 326 (1969), rather than to his executrix who was pressing the suit over the opposition of the surviving partners.

77. Cf. *Thompson Door Co. v. Haven Fund*, 351 A.2d 864 (Del. 1976).

78. See *infra* section IV.B.

79. See *infra* section IV.C.

80. See *infra* section IV.D.

81. See *supra* section III.A.

82. UNIF. PARTNERSHIP ACT § 21(1), 6 U.L.A. 1, 258 (1969).

B. Effect of Conflict of Interest

When a majority or unanimity requirement for enforcement of a partnership right might otherwise apply, a court may create an exception by disregarding partners who are defendants⁸³ or otherwise have a conflict of interest as to the claim being sued on.⁸⁴ In effect, the claim may be enforced by a majority of the disinterested partners (if a majority is required) or by all the disinterested partners (if unanimity is required). A partnership claim against some partners (e.g., for fiduciary breach or usurpation of partnership opportunity) can be enforced in a suit for accounting, which any partner may bring under the U.P.A.⁸⁵ In the most thoughtful opinion dealing with the issue of conflict of interest, the Fifth Circuit has held that a partner ought to be able to enforce a partnership claim in "exceptional circumstances."⁸⁶

What we do hold is that in a proper case—one where the controlling partners, for improper, ulterior motives and not because of what they in good faith believe to be the best interests of the partnership, decline to sue on a valid, valuable partnership cause of action which it is advantageous to the partnership to pursue—Texas law would afford *some* remedy to the minority partner or partnership interest owner *other than merely* a damage or accounting suit against the controlling partners, at least where the latter would not be reasonably effective to protect the substantial rights of the minority.⁸⁷

The court did not specify whether the nature of the suit would be de-

83. See, e.g., *Serpa v. Jolly King Restaurants, Inc.*, 62 F.R.D. 626, 631-35 (S.D. Cal. 1974)(applying California law; antitrust claims; finding both standing and capacity to sue; minority partners must sue in partnership name). See also Comment, *Alternative Remedies in Minority Partners' Suits on Partnership Causes of Action*, 39 SW. L.J. 1021 (1986). When a partner is a defendant, an accounting action may be the exclusive remedy. See A. BROMBERG & L. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 6.08(c)(1988).

84. E.g., *Thompson Door Co. v. Haven Fund*, 351 A.2d 864 (Del. 1976)(nonjoining partners were officers of defendant corporation); *Miller v. Stout*, 706 S.W.2d 785, 787 (Tex. Ct. App. 1986)(25% joint venturers "are disqualified from participating in any decision concerning the filing of this suit due to a conflict of interest"). Cf. *Cates v. International Tel. & Tel. Corp.*, 756 F.2d 1161, 1176-81 (5th Cir. 1985)(applying Texas law), *cert. denied*, 486 U.S. 1055 (1988).

85. *Lane v. Krein*, 375 S.E.2d 351 (S.C. Ct. App. 1988).

86. *Cates v. International Tel. & Tel. Corp.*, 756 F.2d 1161, 1176, 1183 (5th Cir. 1985)(applying Texas law; dictum), *cert. denied*, 486 U.S. 1055 (1988). Those circumstances include, in a language somewhat different from that quoted in the text, at least one

where the controlling nonconsenting partners have conspired with the defendant third party in committing some material part of the wrongs complained of and have, in bad faith for their own personal interests and not with a view to the best interests of the partnerships, colluded with the third party to prevent the suit.

Id. at 1179.

87. *Id.* at 1178; *Thomasson v. Manufacturers Hanover Trust Co.*, 657 F. Supp. 448, 452-53 (S.D. Tex. 1987), *aff'd*, 845 F.2d 1020 (5th Cir. 1988).

rivative or individual but fractional.⁸⁸ However, it did indicate that a fractional claim was a possibility.⁸⁹ Other possible ways of enforcing claims despite disagreement of some partners are noted in the next section.

C. Other Criteria

Fewer than all the partners may be able to bring a class action in behalf of all partners—and thereby in behalf of the partnership where aggregate theory prevails—if they meet the applicable class requirements. These include numerosity, common questions and their pre-dominance, typicality, and adequate representation.⁹⁰

A defendant's failure to make timely objection to the absence of some partners is usually considered a waiver.⁹¹ If timely objection is made, the necessary partners can normally be added by amendment.⁹² Intervention by the unnamed partners is another possibility.⁹³ A dormant partner need not join in a suit to enforce a partnership claim.⁹⁴

If local rules permit, an indispensable but unwilling partner may

88. *Thomasson v. Manufacturers Hanover Trust Co.*, 657 F. Supp. 448, 452 (S.D. Tex. 1987), *aff'd*, 845 F.2d 1020 (5th Cir. 1988).

89. *Cates v. International Tel. & Tel. Corp.*, 756 F.2d 1161, 1180, 1183 (5th Cir. 1985), *cert. denied*, 486 U.S. 1055 (1988). A fractional claim was allowed in *Leff v. Gunter*, 33 Cal. 3d 3, 189 Cal. Rptr. 377, 658 P.2d 740 (1983), which is discussed in note 59 above.

90. *E.g.*, FED. R. CIV. P. 23.

91. *See, e.g.*, *Blankenship v. Hearst Corp.*, 519 F.2d 418, 425 (9th Cir. 1975) (applying California law; untimely after trial began); *Leh v. General Petroleum Corp.*, 165 F. Supp. 933, 936 (S.D. Cal. 1958) (dictum; applying California law); *Engel Mortgage Co. v. Dowd*, 355 So. 2d 1210 (Fla. Dist. Ct. App. 1977) (untimely in motion to vacate judgment and dismiss for want of jurisdiction); *Farish v. Bankers Multiple Line Ins. Co.*, 425 So. 2d 12, 15-16 (Fla. Dist. Ct. App. 1983) (no need to join persons who may have been partners at the time the claim accrued when the objection to their absence was raised after limitations had run on any enforcement by those persons), *approved on this point*, *Bankers Multiple Line Ins. Co. v. Farish*, 464 So. 2d 530, 532 (Fla. 1985). *See also* *Semble, DeToro v. Dervan Inv. Ltd. Corp.*, 483 So. 2d 717 (Fla. Dist. Ct. App. 1986). Compare *Schoenborn v. Williams*, 272 P. 992, 993 (Mont. 1928), where the objection was not raised until the close of plaintiff's case, although this does not appear to be part of the rationale for the court's affirmance of the recovery by the plaintiff partner.

92. *See Shoaff v. Gage*, 168 F. Supp. 161 (D. Neb. 1958); *Sims v. Freeman*, 641 S.W.2d 197 (Mo. Ct. App. 1982) (error to deny timely motion to amend that did not interject new issue or evidence and did not surprise defendant).

93. *See McClain v. Buechner*, 776 S.W.2d 481 (Mo. Ct. App. 1989). In *McClain* intervention was tried but failed since the statute of limitations had run.

94. *See Shoaff v. Gage*, 168 F. Supp. 161, 164 (D. Neb. 1958) (applying Nebraska law); *Dwyer v. Wiley Hotel Co.*, 108 N.E.2d 859, 860-61 (Ohio Ct. App. 1952). *See also* *Henry DeCicco & Co. v. Drucker*, 101 Ill. App. 2d 340, 343, 243 N.E.2d 456, 459 (1968) (omission of unknown partner "is in no way fatal to [plaintiff partner's] rights or to the rights of the partnership").

be added by amendment⁹⁵ or court order⁹⁶ as an involuntary plaintiff,⁹⁷ as a plaintiff on an agreement to indemnify him or her against costs,⁹⁸ or as a defendant.⁹⁹ In some cases, there is no valid objection to a partner's absence as a plaintiff if the partner is already before the court as a true defendant.¹⁰⁰ However, these methods may fail if the majority rule discussed in the preceding Part¹⁰¹ is applicable and a majority of the partners oppose the suit.¹⁰² An unusual statute in Wisconsin explicitly permits a partner to sue in the partner's name without joining the copartners if he or she indicates in the pleading that the claim belongs to the partnership.¹⁰³

A partner may sue individually on a right assigned to him or her by the partnership¹⁰⁴ or after the other partners have assigned their interests in the partnership to him or her¹⁰⁵ or after other partners have waived their interests in the partnership claim being enforced.¹⁰⁶ A

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95. See, e.g., *Sims v. Freeman*, 641 S.W.2d 197 (Mo. Ct. App. 1982)(error to deny timely motion to amend that did not interject new issue or evidence and did not surprise defendant).
96. See, e.g., FED. R. CIV. P. 19(a); CONN. GEN. STAT. § 52-108 (1982); IOWA R. CIV. P. 4; N.Y. CIV. PRAC. L. & R. 1001(b), 1003 (McKinney 1976).
97. E.g., FED. R. CIV. P. 19(a).
98. See, e.g., *Rose v. Beckham*, 86 So. 2d 275 (Ala. 1956); *Kemp v. Murray*, 680 P.2d 758, 761 n.3 (Utah 1984).
99. E.g., Fed. R. Civ. P. 19(a); CONN. GEN. STAT. § 52-101 (1982); NEB. REV. STAT. § 25-317 (1989); N.Y. CIV. PRAC. L. & R. 1001(a)(McKinney 1976); *Cates v. International Tel. & Tel. Corp.*, 756 F.2d 1161, 1176, 1179 (5th Cir. 1985)(citing *Howell v. Bartlett*, 19 S.W.2d 104, 105 (Tex. Civ. App. 1919)), *cert. denied*, 486 U.S. 1055 (1988); *McClain v. Buechner*, 776 S.W.2d 481, 484 (Mo. Ct. App. 1989)(dictum). *But see* *Coast v. Hunt Oil Co.*, 195 F.2d 870, 872 (5th Cir. 1952)(under Louisiana law single partner could not maintain suit, therefore could not add copartner as defendant).
100. *Spiritas v. Robinowitz*, 544 S.W.2d 710, 715 (Tex. Civ. App. 1976). *But cf.* *Cates v. International Tel. & Tel. Corp.*, 756 F.2d 1161 (5th Cir. 1985), *cert. denied*, 486 U.S. 1055 (1988). The presence of the other partners—who had intervened to oppose the suit—was apparently not a factor in the holding in *Cates* that the suit might be maintained if exceptional circumstances exist.
101. See *supra* section III.C.
102. *Lane v. Krein*, 375 S.E.2d 351 (S.C. Ct. App. 1988).
103. WIS. STAT. ANN. § 803.01(2)(1981).
104. *Foss v. Mansell*, 378 So. 2d 802 (Fla. Dist. Ct. App. 1979). See *Harrell & Sumner Contracting Co. v. Peabody Petersen Co.*, 546 F.2d 1227 (5th Cir. 1977)(but for first joint venturer's assignment of its interest in joint venture contract claim to second joint venturer, first joint venturer would be an indispensable party as a matter of federal law for diversity purposes; joint venturer's assignment, retaining a right to half the net proceeds of the claim, was collusive, so failed to achieve diversity jurisdiction).
105. *Johnson v. Secretary of & United States Dep't of Hous.*, 710 F.2d 1130, 1136-37 (5th Cir. 1983); *Stephen v. Phillips*, 101 N.M. 790, 689 P.2d 939 (N.M. Ct. App. 1984).
106. *Grant County Deposit Bank v. McCampbell*, 194 F.2d 469 (6th Cir. 1952)(partner, who declined to join as plaintiff, was named as a defendant, and disclaimed any interest in partnership claim was not an indispensable party and, upon dismissal

partner who transacted business for the partnership in his or her own name should ordinarily be able to sue individually on any resulting claim.¹⁰⁷ But individual suit has been denied on the ground that it denies the defendant the right to assert defenses or counterclaims the defendant might have against the partnership.¹⁰⁸ If the partnership claim is based on a statute expressing or implying a strong policy in favor of private litigation, a court is more likely to permit a single partner or fewer than all the partners to enforce the claim.¹⁰⁹

In the course of winding up after dissolution, one partner has been allowed to sue on a partnership claim despite the refusal of the other partner to join.¹¹⁰ While this approach is consistent with part of the analysis in Part III,¹¹¹ it is inconsistent with the majority rule which is required by the U.P.A. and which normally continues during winding up. If the partnership is dissolved, a partner who is blocked from suing directly or derivatively may be able to obtain the appointment of a receiver who has authority to sue to enforce the partnership's claims.¹¹² Similarly a partnership's bankruptcy trustee may enforce

of the claim, did not destroy diversity jurisdiction; judgment for other partners against third party affirmed).

107. *Hutchinson v. Brotman-Sherman Theatres, Inc.*, 94 Ill. App. 3d 1066, 1071-72, 419 N.E.2d 530, 535 (1981)(third party contracting with partner "d/b/a T.K.O. Productions" knew of partnership and partners). See *Henry DeCiccio & Co. v. Drucker*, 101 Ill. App. 2d 340, 243 N.E.2d 456 (1968)(plaintiff DeCiccio Co., apparently a partnership, was allowed to enforce a contract made in the name of DeCiccio Painting Service, treated as an individual contract). Compare the right of a partner under UNIF. PARTNERSHIP ACT § 10(3), 6 U.L.A. 1, 155 (1969), to convey partnership property the title to which is in the partner's name.
108. *South Texas Aggregates, Inc. v. Pendell*, 694 S.W.2d 608 (Tex. Ct. App. 1985).
109. *Leh v. General Petroleum Corp.*, 165 F. Supp. 933, 935, 937 (S.D. Cal. 1958)(antitrust); *Serpa v. Jolly King Restaurants, Inc.*, 62 F.R.D. 626, 632-35 (S.D. Cal. 1974)(antitrust).
110. *Goldstick v. Kusmiersky*, 593 F. Supp. 639 (N.D. Ill. 1984), *rev'd on other grounds*, 788 F.2d 456 (7th Cir. 1986); *Leh v. General Petroleum Corp.*, 165 F. Supp. 933, 936-37 (S.D. Cal. 1958). Both district courts cite UNIF. PARTNERSHIP ACT § 35(1)(a), 6 U.L.A. 1, 429 (1969), which grants a partner authority to bind the partnership by acts appropriate for winding up. The *Goldstick* district court also cites a holding that a dead partner's estate need not be joined as a plaintiff. The holding is inapposite since only partners, not estates (except the estate of the last partner), may participate in winding up under UNIF. PARTNERSHIP ACT § 37, 6 U.L.A. 1, 444 (1969). Finally, the *Goldstick* district court cites a pre-U.P.A. decision, *Heartt v. Walsh*, 75 Ill. 200, 202 (1874). Neither district court cites the majority rule in section 18(h) of the U.P.A.
111. See *supra* sections B, E & F of Part III.
112. *Cates v. International Tel. & Tel. Corp.*, 756 F.2d 1161, 1178-79, 1183 (5th Cir. 1985), *cert. denied*, 486 U.S. 1055 (1988). The court of appeals in *Cates* cited *J. CRANE & A. BROMBERG, PARTNERSHIP* 470 (1968), and suggested that the suit might be delayed pending appointment of the receiver. See also *Glusband v. Fittin Cunningham Lauzon, Inc.*, 582 F. Supp. 145, 148-49 (S.D.N.Y. 1984)(limited partnership's receiver has standing to sue on partnership's securities fraud claim). "Exceptional circumstances" involving a conflict of interest by the non-

the partnership's claims.¹¹³

D. Individual Claims

A partner may, of course, sue individually on his or her individual claim. But the line between partnership claims and a partner's individual claims is not always clear. To try to avoid the limitations on enforcement of partnership claims described in the preceding sections and Part II, plaintiffs have sometimes asserted that they are suing on individual claims when the claims are related to an injury to the partnership. Claims that have been regarded as partnership claims rather than individual include:

- Claims of injury to a partner's interest in the partnership (e.g., reduction in value of the interest) or to the partner's contribution to the partnership or to the partner's income stream from the partnership.¹¹⁴
- Claims of loss of reputation from failure of the partnership business and related loss of opportunity to advance in the industry.¹¹⁵
- Claims of economic injury to property owned in undivided interest by a partner but operated by the partnership.¹¹⁶

Claims that have been regarded as individual include:

- Claims of tortious interference with the relationship between a partner and the partnership (or copartners).¹¹⁷

joining partners are considered in section IV.B above. See *supra* text accompanying notes 86-88. Where a strong entity theory prevails, as in Louisiana, suits may be permitted only by the partnership. See *infra* section VI.B.

113. *E.g.*, *Thomasson v. Manufacturers Hanover Trust Co.*, 657 F. Supp. 448, 452-53 (S.D. Tex. 1987), *aff'd*, 845 F.2d 1020 (5th Cir. 1988) (partners denied right to sue because claim was property of partnership bankruptcy estate).
114. *Cates v. International Tel. & Tel. Corp.*, 756 F.2d 1161, 1181-82 (5th Cir. 1985), *cert. denied*, 486 U.S. 1055 (1988); *Thomasson v. Manufacturers Hanover Trust Co.*, 657 F. Supp. 448, 453 (S.D. Tex. 1987) (plaintiffs alleged that banks financing a gas processing plant conspired with the managing partner to cause the partnership to default on its loan and lose the plant through foreclosure), *aff'd*, 845 F.2d 1020 (5th Cir. 1988); *In re Summit Ridge Apartments, Ltd.*, 104 Bankr. 405, 410 (Bankr. N.D. Ala. 1989).
115. *Cates v. International Tel. & Tel. Corp.*, 756 F.2d 1161, 1181-82 (5th Cir. 1985), *cert. denied*, 486 U.S. 1055 (1988).
116. *Coast v. Hunt Oil Co.*, 195 F.2d 870 (5th Cir.) (applying Louisiana law), *cert. denied*, 344 U.S. 836 (1952).
117. *Thomasson v. Manufacturers Hanover Trust Co.*, 657 F. Supp. 448, 453 (S.D. Tex. 1987), *aff'd*, 845 F.2d 1020 (5th Cir. 1988). See also *Cates v. International Tel. & Tel. Corp.*, 756 F.2d 1161, 1182 (5th Cir. 1985) (noting that such claims might be individual), *cert. denied*, 486 U.S. 1055 (1988). The court of appeals in *Cates* similarly described a minority partner's claims that the majority partners, and third parties who had injured the partnership business, had disparaged his business ability and tried to drive him out of the insurance industry. It remanded for consideration of the individual claims. *Cf. Abel v. American Art Analog, Inc.*, 838

- Claims of fraud inducing the partners to invest in the partnership.¹¹⁸
- Claims to receive profits of a corporation (owned by a third party) to which the partnership had assigned its publishing project in return for payment of thirty percent of the profits to the three partners.¹¹⁹

V. ENFORCEMENT OF PARTNERSHIP RIGHTS BY FEWER THAN ALL PARTNERS—DERIVATIVE SUITS

A. In General

The general distinction between direct and derivative enforcement of partnership rights was introduced earlier.¹²⁰ This Part discusses derivative enforcement. A derivative suit is typically styled *A in behalf of ABC Partnership v. D*, or *A derivatively for ABC Partnership v. D*, or *A in the right of ABC Partnership v. D*. The substantive distinction between a derivative suit and enforcement of a partnership right by fewer than all the partners is not always clear but seems to be as follows: In a derivative suit, the plaintiff partner is typically acting against the wishes of those partners who have decisionmaking authority for enforcement of the partnership right; in a direct enforcement by fewer than all the partners, on the other hand, the plaintiff partners are typically acting with approval of, or without objection from, the partners with authority perhaps excluding the partners with conflict of interest. However, this distinction does not always prevail, and there are cases which are treated as direct, but in which partners with authority are objecting.¹²¹

Derivative suits in general partnerships are in an early stage of development. By contrast, derivative suits in limited partnerships are well developed through earlier caselaw¹²² and later statutes.¹²³ There,

F.2d 691, 695-98 (3d Cir. 1988)(tortious interference claim failed on merits because partnership was dissolved before alleged interference occurred).

118. *In re Summit Ridge Apartments, Ltd.*, 104 Bankr. 405, 409-10 (Bankr. N.D. Ala. 1989)(individual partners denied permissive intervention in bankruptcy proceeding and required to assert their individual fraud claims in a nonbankruptcy forum).

119. *Abel v. American Art Analog, Inc.*, 838 F.2d 691, 695-96 (3d Cir. 1988). The court in *Abel* held that the other partners (whose joinder would have destroyed diversity) need not be joined. The court noted that they might sue separately for their shares of the profit. On another point, the court held that the assignment of the project to the corporation dissolved the partnership. This may have influenced its decision that the partners had individual rights to profit shares from the corporation although it did not mention the dissolution relative to the individual shares.

120. See *supra* section I.B.

121. See *supra* notes 48-55.

122. *E.g.*, *Klebanow v. New York Produce Exch.*, 344 F.2d 294 (2d Cir. 1965).

derivative suits are used primarily by limited partners against general partners (e.g., for fiduciary breach or other misconduct in the management of the partnership). In general partnerships, such claims can readily be brought in an action for an accounting. Derivative suits by general partnerships against third parties may be less often necessary than by limited partnerships because of the general partners' shared managerial powers which may include enforcing partnership claims against third parties. This may explain the slower evolution of general partnership derivative suits. Nonetheless, given the need for enforcement against third parties and the divided caselaw on the ability of fewer than all the partners to enforce, there is a need—at least occasionally—for something like the derivative suit. The need is even greater where some of the partners have a conflict of interest in respect of enforcing the claim, although some courts have found ways of permitting enforcement in this situation without using derivative language or procedures.

B. Validity

For the reasons given in the preceding section, it is not surprising that courts¹²⁴ and commentators¹²⁵ have started to indicate the appropriateness of derivative suits, using analogies from shareholder and director enforcement of corporate rights and beneficiary enforcement of trust rights. Some courts indicate that a derivative suit is the only way fewer than all the partners may enforce a partnership claim: "A member of a partnership seeking to recover from a third party a debt due the partnership must bring the action on behalf of and for the benefit of the partnership and may not recover upon such an obligation individually."¹²⁶

Some courts have rejected a general partner's derivative suit partly on the ground that derivative suits are authorized by statute for corporate shareholders and for limited partners but not for general partners.¹²⁷ Additional grounds suggested are that general partners have

123. *E.g.*, REV. UNIF. LTD. PARTNERSHIP ACT §§ 1001-1004, 6 U.L.A. 239, 401-04 (1976 & Supp. 1991)(amended 1985).

124. *Cates v. International Tel. & Tel. Corp.*, 756 F.2d 1161, 1176-81 (5th Cir. 1985)(authorizing derivative or similar suit in "exceptional circumstances"), *cert. denied*, 486 U.S. 1055 (1988).

125. Arguments for and against partnership derivative suits are carefully considered in Comment, *supra* note 83, which finds preponderant the arguments for.

126. *Kirschbaum v. Merchants Bank of N.Y.*, 272 A.D. 336, 336, 71 N.Y.S.2d 79, 80 (1947); *International Television Prods., Ltd. v. Twentieth Century Fox*, 622 F. Supp. 1532, 1536 (S.D.N.Y. 1985)(contract claim of joint venture).

127. *Hauer v. Bankers Trust of N.Y. Corp.*, 65 F.R.D. 1, 4 (E.D. Wis. 1974)(applying Wisconsin law). The other ground—objection by a majority of the general partners who were granted control by the partnership agreement—is considered in section III.C above. *See also Kline Hotel Partners v. Aircoa Equity Interests, Inc.*, 708 F. Supp. 1193, 1194-95 (D. Colo. 1989)(applying Colorado law).

other effective remedies—such as accounting, dissolution and contribution rights—while shareholders and limited partners do not.¹²⁸ However, these are remedies against the other partners and unlikely to be effective to enforce partnership rights against third persons. It would be strange if a partner could not litigate a partnership claim in which he or she had a rather immediate interest while a shareholder could litigate a corporate claim in which he or she has a very remote interest.

C. Requirements

The requirements for a partnership derivative suit are not well developed. The indications are that they will be less complex than those for corporate derivative suits.¹²⁹ But they are likely to include demand on the other partners to sue, or a showing of the futility of demand. Similar requirements for derivative suits by limited partners have now been widely adopted.¹³⁰ The most comprehensive judicial discussion of such suits suggests a more stringent requirement as one of its criteria for those “exceptional circumstances” that justify a derivative suit or direct suit by fewer than all the partners:

We do not hold that Texas law would necessarily allow a derivative action on the part of a minority partner or an owner of a partnership interest. What we do hold is that in a proper case—one where the controlling partners, for improper, ulterior motives and not because of what they in good faith believe to be the best interests of the partnership, decline to sue on a valid, valuable partnership cause of action which it is advantageous to the partnership to pursue—Texas law would afford *some* remedy to the minority partner or partnership interest owner *other than merely* a damage or accounting suit against the controlling partners, at least where the latter would not be reasonably effective to protect the substantial rights of the minority.¹³¹

The effect of the other partners’ response to a derivative plaintiff’s

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128. *Kline Hotel Partners v. Aircoa Equity Interests, Inc.*, 708 F. Supp. 1193, 1195 (D. Colo. 1989). The court understates the rights of limited partners to accounting and perhaps to dissolution.
 129. Corporate derivative suits are discussed at length in D. DEMOTT, *SHAREHOLDER DERIVATIVE ACTIONS* (1987), and more summarily in 1 R. MAGNUSON, *SHAREHOLDER LITIGATION* §§ 8.01-28 (1984).
 130. REV. UNIF. LTD. PARTNERSHIP ACT § 1001, 6 U.L.A. 239, 401 (1976 & Supp. 1991)(amended 1985)(limited partner may bring suit “if general partners with authority to do so have refused to bring the action or an effort to cause those general partners to bring the action is not likely to succeed”).
 131. *Cates v. International Tel. & Tel. Corp.*, 756 F.2d 1161, 1178 (5th Cir. 1985)(applying Texas law)(emphasis in original), *cert. denied*, 486 U.S. 1055 (1988); *Thomasson v. Manufacturers Hanover Trust Co.*, 657 F. Supp. 448, 452-53 (S.D. Tex. 1987), *aff’d*, 845 F.2d 1020 (5th Cir. 1988). The Fifth Circuit added: “[W]e do not suggest that these remedies are available to invade the good faith managerial business judgment of the controlling partners, despite the fact that the court might disagree with such judgment or even view it as not being entirely reasonable.” *Cates v. International Tel. & Tel. Corp.*, 756 F.2d 1161, 1179 (5th Cir. 1985), *cert. denied*, 486 U.S. 1055 (1988).

demand might be determined by the rules of the U.P.A. discussed in Part III above. For example, if the suit is deemed an extraordinary matter requiring unanimous consent, any partner's objection might undermine the suit by virtue of section 18(h) of the U.P.A. If the suit is considered an ordinary matter requiring majority approval under section 18(h), failure to obtain approval might undermine the suit. But the U.P.A. might be overlooked in preference for corporate analogies, much as it has been overlooked in preference for procedural issues of necessary or indispensable parties referred to in Part II above. Corporate analogies could lead a court to a number of different positions, including (a) acceptance of the partners' decision if they have independence, adequate investigation and good faith (similar to the corporate business judgment standard), (b) exercise of the court's own business judgment to decide whether the suit should proceed, and (c) rejection of the decision of partners who are named defendants or otherwise in a conflict position.¹³² The opinion just quoted does not consider the U.P.A. and does mention corporate analogies; its position has elements of (a), (b) and (c) but seems closer to (a).¹³³

The federal rule on derivative suits applies alike to corporations and unincorporated associations, presumably including partnerships. A partnership derivative suit in federal court would require the plaintiff partner to plead, among other things, "the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort."¹³⁴ The plaintiff in federal court must also show that he or she adequately represents the interests of the members.¹³⁵ A number of state procedural rules are similar to the federal rules.¹³⁶

The partnership may be named as a nominal defendant in a derivative suit. If the applicable law requires that all partners be named in a suit against the partnership, they should also be named in a derivative suit. They may also be nominal parties if no relief is sought against them.

A partner's derivative suit would appropriately be carried on at the partner's individual expense, subject to (1) indemnification or reimbursement from the partnership under the U.P.A.¹³⁷ if the expense is found to be reasonably made in the ordinary and proper conduct of the

132. These and other variations are discussed in D. DEMOTT, *SHAREHOLDER DERIVATIVE ACTIONS* §§ 5.03-.06 (1987).

133. See the additional language quoted from *Cates* in note 131 above.

134. FED. R. CIV. P. 23.1.

135. *Id.* See D. DEMOTT, *SHAREHOLDER DERIVATIVE ACTIONS* § 4.04 (1987).

136. D. DEMOTT, *SHAREHOLDER DERIVATIVE ACTIONS* § 4.02, at 9-29 (1987), provides a chart of the state requirements.

137. UNIF. PARTNERSHIP ACT § 18(b), 6 U.L.A. 1, 213 (1969).

firm's business or for the preservation of its business or property,¹³⁸ or (2) an award of attorney's fees on the corporate precedent if the suit is successful.¹³⁹ A derivative suit may not be maintained if the partnership is already suing on the same claim.¹⁴⁰

VI. ENFORCEMENT OF PARTNERSHIP CLAIMS BY PARTNERSHIPS (IN PARTNERSHIP NAME)

A. In General

At common law a partnership could not sue in its own name, although a few courts have allowed it to do so.¹⁴¹ A number of states have by statute or procedural rule authorized partnerships to sue in their own names.¹⁴²

B. Without Statute or Rule

Where there is no procedural rule or statute to modify the common law aggregate theory of partnership, and where the courts have not accepted the U.P.A.'s modification of the aggregate theory, most courts hold that a partnership cannot sue in the partnership name since it lacks capacity or is not considered a legal person.¹⁴³ Other

138. See *Evans v. Boggs*, 35 Tenn. App. 354, 386-87, 245 S.W.2d 641, 656 (1951)(partners who sued successfully to recover firm assets over objections of copartners entitled to reimbursement of attorneys fees and expenses).

139. Attorney fees in corporate suits are discussed in D. DEMOTT, *SHAREHOLDER DERIVATIVE ACTIONS* § 6.04 (1987).

140. *In re Summit Ridge Apartments, Ltd.*, 104 Bankr. 405, 410 (Bankr. N.D. Ala. 1989)(claim being asserted by partnership as debtor in possession in bankruptcy reorganization).

141. See *infra* section VI.B.

142. See *infra* section VI.C.

143. *E.g.*, *Excalibur Oil, Inc. v. Sullivan*, 659 F. Supp. 1539, 1540-41 n.1 (N.D. Ill. 1987)(dictum; by negative inference from statute permitting partnership to be sued in firm name). Perhaps the strongest statement and surely one of the most metaphorical is the following:

The Uniform Partnership Law did not transform a partnership into a separate or juristic entity and generally, all partners are necessary parties-plaintiff to enforce an obligation due the partnership. [A] partnership has no legal existence apart from its members, but is a mere ideal entity . . . [a] caponized litigant whose crowings will gain . . . neither success nor posterity.

Allgeier, Martin & Assocs. v. Ashmore, 508 S.W.2d 524, 525 (Mo. App. 1974)(citations omitted).

Accord *Randle v. Spectran*, 129 F.R.D. 386, 389 (D. Mass. 1988)(dismissing claims under Massachusetts law brought by partnership but sustaining its federal law claims under FED. R. Civ. P. 17(b)); *Metzger Bros., Inc. v. Friedman*, 288 Ala. 386, 396, 261 So. 2d 398, 406 (1971)(partnership not a person); *Aronovitz v. Stein Properties*, 322 So. 2d 74 (Fla. Dist. Ct. App. 1975)(similar); *Marvil Properties v. Fripp Island Dev. Corp.*, 273 S.C. 619, 258 S.E.2d 106 (1979)(even though partnership considered as an entity for determining legal relationships and liabilities of partners). *Cf.* *Dolph v. Cortez*, 8 Ariz. App. 429, 430, 446 P.2d 939, 940 n.1

courts, led by a Montana decision, recognize the modern treatment of a partnership as an entity. In allowing the suit by the partnership, the Montana court reasoned from the U.P.A. that it would be illogical and unfair to permit a partnership to own a claim¹⁴⁴ but not to enforce it, or to own property¹⁴⁵ but not to protect it.¹⁴⁶ Some other courts agree,¹⁴⁷ especially if the suit is to protect partnership property.¹⁴⁸ Even where a partnership is regarded as lacking capacity to sue, a defendant's failure to make timely objection will usually be treated as a waiver.¹⁴⁹ Where a strong entity concept prevails, as in Louisiana, a partnership right may be enforced *only* in the partnership name.¹⁵⁰

When the partnership cannot sue, it follows that partners must be plaintiffs. That may mean all partners, a majority of partners or a single partner as discussed earlier.¹⁵¹

(1968)(dictum, citing a statute stating that in situations not covered by the U.P.A., the common law applies). Arizona has since adopted a rule permitting partnerships to sue and be sued in the firm name.

A reason given in some early cases is that an organization's ability to sue or be sued is a corporate characteristic which can be granted only by legislation. See, e.g., *American Steel & Wire Co. v. Wire Drawers' & Die Makers Unions*, 90 F. 598, 600 (C.C.N.D. Ohio 1898).

A joint venture's capacity is treated like a partnership's. Cases are collected in Annotation, *Joint Venture's Capacity To Sue*, 56 A.L.R.4th 1234 (1987).

144. UNIF. PARTNERSHIP ACT § 9(3)(e), 6 U.L.A. 1, 132 (1969)(requiring unanimous partner consent to submit a partnership claim to arbitration).
145. *Id.* §§ 8, 9, 10, 6 U.L.A. at 115, 132-33, 155-56.
146. *Decker Coal Co. v. Commonwealth Edison Co.*, 220 Mont. 251, 714 P.2d 155 (1986)(contract claim; joint venture treated as partnership). The court in *Decker Coal* also noted statutes permitting partnerships to be sued in the partnership name and, in small claims courts, to sue in the partnership name. *Id.* at 255, 714 P.2d at 157.
147. *Gary Energy Corp. v. Metro Oil Prods.*, 114 F.R.D. 69 (D. Utah 1987)(suit for collection of open accounts for products sold brought in partnership name); *Cottonwood Mall Co. v. Sine*, 767 P.2d 499, 501 (Utah 1988)(lessor's recovery of leased property).
148. *Malibu Partners, Ltd. v. Schooley*, 372 So. 2d 179 (Fla. Dist. Ct. App. 1979)(to contest ad valorem tax on partnership property); *Pinellas County v. Lake Padgett Pines*, 333 So. 2d 472 (Fla. Dist. Ct. App. 1976)(to enjoin well field development that would damage partnership property); *New England Herald Dev. Group v. Town of Falmouth*, 521 A.2d 693 (Me. 1987)(to review adverse zoning decision on partnership property). Suits of this sort have a kind of in rem quality that makes legal personality of the partnership less important. In such suits the partners are likely to be in agreement and questions of authority are therefore less important. See *Cottonwood Mall Co. v. Sine*, 767 P.2d 499 (Utah 1988).
149. *Haddock Flying Serv. v. Tisdale*, 288 S.C. 62, 339 S.E.2d 525 (S.C. Ct. App. 1986).
150. *Johnson v. Secretary of & United States Dep't of Hous.*, 710 F.2d 1130, 1136 (5th Cir. 1983); *Coast v. Hunt Oil Co.*, 195 F.2d 870 (5th Cir.), *cert. denied*, 344 U.S. 836 (1952); *Dalby v. United States Fidelity & Guar. Co.*, 365 So. 2d 568, 570 (La. Ct. App. 1978)(alternative holding); *Davis v. Pioneer Bank & Trust Co.*, 272 So. 2d 430 (La. Ct. App. 1973); *Apex Sales Co. v. Abraham*, 201 So. 2d 184, 187-88 (La. Ct. App. 1967).
151. See *supra* Parts II-V.

C. With Statute or Rule

Many jurisdictions, including a number of the major commercial ones, have statutes or rules saying that partnerships may sue in the partnership name¹⁵² or, more generally, that unincorporated associations may sue in their own names.¹⁵³ Some of these provisions are motivated by impatience with the common law rule: "The rule that a partnership may not sue or be sued in its partnership name is merely a useless relic of the strict procedural rules at common law with nothing, apparently, to justify its continued existence."¹⁵⁴

Provisions for partnerships to be sued in the partnership name are more numerous and generally came earlier than provisions for partnerships to sue in the firm name. This is because it is costlier and more difficult for third-party plaintiffs to identify and locate partners than it is for partnership plaintiffs to gather the necessary members to join in a suit.

Common name provisions eliminate any basis for a defendant's objection that the plaintiff partnership lacks capacity to sue. Moreover, the provisions typically make it unnecessary for any partner to sue individually, much less for all partners to sue.¹⁵⁵ But it still may be open to a defendant or a partner to show that the suit is brought without authority.¹⁵⁶

152. *E.g.*, ARIZ. R. CIV. P. 17(j); CAL. CIV. PROC. CODE § 388 (West 1973); COLO. REV. STAT. ANN. § 13-50-105 (1987); CONN. GEN. STAT. ANN. § 52-112 (West 1960); DEL. CODE ANN. tit. 10, § 3904 (1975); GA. CODE ANN. § 14-8-15.1 (1981); IND. R. TRIAL P. 17(B), (E); IOWA R. CIV. P. 4; KAN. STAT. ANN. § 56-344 (1983); LA. CODE CIV. PROC. ANN. art. 688 (West 1991); ME. REV. STAT. ANN. § 160-A (1978); MICH. COMP. LAWS ANN. § 600.2051(2) (West 1981); NEB. REV. STAT. § 25-313 (1989); N.M. STAT. ANN. § 38-4-5 (1978); N.Y. CIV. PRAC. L. & R. 1025 (McKinney 1976); N.C. GEN. STAT. § 1-69.1 (1983); OHIO REV. CODE ANN. § 2307.24 (Anderson 1981); OKLA. STAT. ANN. tit. 12, § 1082 (West 1988); TEX. R. CIV. P. 28 (West 1990); VT. STAT. ANN. tit. 12, § 814 (1973); VA. CODE ANN. § 50-8.1 (1989); WYO. R. CIV. P. 17(b).

153. ILL. ANN. STAT. § 2-209.1 (1980); N.M. STAT. ANN. § 53-10-6 (1978).

154. *Ruzicka v. Rager*, 305 N.Y. 191, 197, 111 N.E.2d 878, 881 (N.Y. 1953) (quoting 1945 N.Y. JUDICIAL COUNCIL ANN. REP. 221, 224 (commenting on N.Y. CIV. PRAC. L. & R. 1025 (McKinney 1976) (originally enacted as N.Y. Civ. Prac. Act, L.1945, chap. 842, § 222-a))).

155. *Miller v. Stout*, 706 S.W.2d 785, 787 (Tex. Ct. App. 1986) (if the two-thirds majority required by the joint venture agreement consent, suit may be filed in the venture's name without joinder of individual members). See also *Johnson v. Pioneer Mortgage Co.*, 264 S.W.2d 761 (Tex. Civ. App. 1954) (no need to identify partners in complaint; defendant may obtain that information by discovery); *Navigator Group Funds v. Shearson Hayden Stone, Inc.*, 487 F. Supp. 416 (S.D.N.Y. 1980). Cf. *Hanna Mining Co. v. Minnesota Power & Light Co.*, 573 F. Supp. 1395, 1399 (D. Minn. 1983) ("Generally, all partners must join in asserting a partnership claim under a contract if the suit is not in the name of the partnership."), *aff'd*, 739 F.2d 1368 (8th Cir. 1984).

156. See *Navigator Group Funds v. Shearson Hayden Stone, Inc.*, 487 F. Supp. 416 (S.D.N.Y. 1980). The court in that case refused to dismiss a suit brought in name

Common name provisions are permissive, not mandatory.¹⁵⁷ Partners may continue to sue as individuals, subject to the limitations described earlier.¹⁵⁸

The federal rules have a partial common name provision: a partnership "may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States."¹⁵⁹ Partnerships may sue and be sued in federal court on a variety of federal claims, such as civil rights, antitrust and securities.¹⁶⁰ In other federal court cases, capacity to sue or be sued is determined by the law of the state in which the court sits.¹⁶¹

of limited partnership where the defendants offered no evidence that a general partner failed to authorize the suit. The court stated: "Nor have the defendants cited any authority for the proposition that proper authorization for the bringing of the action by the partnership must be alleged in the complaint." *Id.* at 417 n.1. See also *Miller v. Stout*, 706 S.W.2d 785, 787 (Tex. App. 1986)(error to exclude plaintiffs' evidence that requisite majority had consented).

See also *Thompson Door Co. v. Haven Fund*, 351 A.2d 864, 865 (Del. 1976)(denying motion to dismiss; each partner has power to use legal process to enforce partnership claims, especially where copartners have conflicting interests). For further discussion of a partner's authority to sue, see the discussion in section III.E above. Cf. RESTATEMENT (SECOND) OF AGENCY § 370 (1958)(in agent's action for principal's benefit "it is a defense that the agent does not have authority from the principal to sue or to continue the action").

The somewhat parallel question of a corporate officer's authority to file suit in the corporation's name is discussed in H. HENN & J. ALEXANDER, *LAW OF CORPORATIONS* § 225, at 600-03 (3d ed. 1983); Goebel, *Authority of the President Over Corporate Litigation: A Study in Inherent Agency*, 37 ST. JOHN'S L. REV. 29 (1962); Annotation, *Power of President of Corporation to Have Litigation Instituted by It Where a Board of Directors Has Failed or Refused to Grant Permission*, 10 A.L.R.2d 701 (1950); Annotation, *Power of Secretary or Treasurer of Corporation to Institute Litigation for It*, 64 A.L.R.2d 900 (1959); Annotation, *Power of President of Corporation to Commence or to Carry on Arbitration Proceedings*, 65 A.L.R.2d 1321 (1959).

157. *Frazier v. Carlin*, 42 Colo. App. 226, 228-29, 591 P.2d 1348, 1350 (1979); *Ruzicka v. Rager*, 305 N.Y. 191, 197 111 N.E.2d 878, 881 (N.Y. 1953).

158. See *supra* Parts II-V; *Chien v. Chen*, 759 S.W.2d 484, 489-92 (Tex. Ct. App. 1988).

159. FED. R. CIV. P. 17(b).

160. *E.g.*, *Randle v. Spectran*, 129 F.R.D. 386, 389 (D. Mass. 1988)(federal securities law claims); *Caliber Partners, Ltd. v. Affeld*, 583 F. Supp. 1308, 1313 (N.D. Ill. 1984)(federal securities law claims); *Serpa v. Jolly King Restaurants, Inc.*, 62 F.R.D. 626, 632 (S.D. Cal. 1974)(federal antitrust claims). Rule 17(b) has been interpreted to let a partnership sue to enforce an arbitration agreement involving otherwise nonfederal issues on the theory that the enforceability of an arbitration agreement is a substantive federal right by virtue of the Federal Arbitration Act, 9 U.S.C. §§ 1 to 15 (1988). See *O & Y Landmark Assocs. of Va. v. Nordheimer*, 725 F. Supp. 578 (D.D.C. 1989).

161. FED. R. CIV. P. 17(b). See, *e.g.*, *Decker Coal Co. v. Commonwealth Edison Co.*, 220 Mont. 251, 714 P.2d 155 (1986) (construing local law on a certified question from the Ninth Circuit); *Caliber Partners, Ltd. v. Affeld*, 583 F. Supp. 1308, 1313-14 (N.D. Ill. 1984)(limited partnerships have capacity to sue on federal securities

VII. ENFORCEMENT OF PARTNERSHIP RIGHTS— A CRITIQUE

A. In General

The law on enforcement of partnership rights or claims is needlessly complicated and inconsistent. By way of conclusion this Part indicates ways enforcement can be made more consistent and perhaps less complicated by legislatures, courts, litigators and drafters of partnership agreements.

B. Legislatures

Enforcement of partnership rights has been greatly simplified in one respect by common name statutes or procedural rules of the kind discussed in Part V above¹⁶² and adopted in a number of states. Section 307(a) of the proposed Revised Uniform Partnership Act would embrace this simplification by prescribing that "[a] partnership may sue and be sued in the partnership name."¹⁶³ This or similar legislation (or procedural rules) should be adopted by states that do not already have it.

C. Courts—General Principles

For their part, the courts could greatly simplify the law by focusing less on abstract jurisdictional issues and more on practical operational and contractual issues reflected in these general principles:

- (1) Recognize the commercial reality of the partnership as an entity in many, perhaps most, instances.
- (2) Recognize the substantial "partner authority" of each member of a general partnership. Unless challenged, a partner's capacity or authority to sue for the partnership should be presumed.
- (3) If the capacity of the suing partner(s) is challenged, determine the capacity in accordance with the partnership agreement if the agreement reasonably addresses the point, and if it does not, in accordance with guidance of the U.P.A. described in section D below as standards.
- (4) Assure that all partners are aware of enforcement actions¹⁶⁴ and given an opportunity to participate in them.

claims but not on pendent state law claims for which Illinois law controls); *Randle v. Spectran*, 129 F.R.D. 386, 389 (D. Mass. 1988)(similar; Massachusetts law).

162. See *supra* section V.I.

163. UNIF. PARTNERSHIP ACT § 12, 6 U.L.A. 1, 160 (1969); REV. UNIF. PARTNERSHIP ACT § 307(a)(Discussion Draft 1991). If the statutory attribution of partner's knowledge to the partnership seems insufficient in a situation, notice to partners can be ordered.

164. See *supra* section III.D.

- (5) Recognize the quite different interests of nonpartner defendants and nonsuing partners¹⁶⁵ in the enforcement of partnership rights. Indeed, given the preclusive effect appropriately accorded a suit by fewer than all the partners, a court should have serious doubts whether a nonpartner defendant has any legitimate basis for objecting to the absence of some partners. Objection should be allowed only on a convincing showing that the defendant is subject to repetitive suit if the pending suit proceeds to final judgment or settlement with the plaintiff.
- (6) Assume that any recovery in an action initiated by fewer than all the partners benefits the partnership unless there are strong equitable reasons¹⁶⁶ to limit the recovery to the suing partners (alone or with some of the other partners). Absent such reasons, recovery by the suing partners should go to the partnership in accordance with the U.P.A.¹⁶⁷ which requires a partner to account to the partnership for any benefits—and to hold as trustee for the partnership any profits—derived by him from transactions connected with the partnership. But benefit to the partnership can be more directly accomplished by including the partnership in the judgment.
- (7) Assume that the defendant is protected from multiple suits by reciting in the judgment that it is binding on the partnership and all its partners.

D. Courts—Uniform Partnership Act Standards

The several seemingly inconsistent sections of the U.P.A. relevant to enforcement of partnership rights and the "partner authority" of each member of a general partnership can be reconciled and best given effect as follows if there is no controlling provision in the partnership agreement:

- If the enforcement is an ordinary matter¹⁶⁸ and there is no disagreement among the partners, any partner can enforce a partnership right.¹⁶⁹
- If the enforcement is an ordinary matter and there is disagreement among the partners, a majority¹⁷⁰ can enforce or can au-

165. The difference between the interests of nonpartner defendants and nonsuing partners is discussed in section I.B above.

166. Strong equitable reasons might exist when recovery by the partnership would benefit partners who participated in the wrong being sued on. Similar reasons have allowed direct recovery by some shareholders in corporate derivative suits. See D. DEMOTT, *SHAREHOLDER DERIVATIVE ACTIONS* § 7.06, at 31-32 (1987).

167. UNIF. PARTNERSHIP ACT § 21(1), 6 U.L.A. 1, 258 (1969).

168. What is an ordinary matter is discussed in section III.C above.

169. UNIF. PARTNERSHIP ACT §§ 9(1), 18(e), 25(2)(a), 6 U.L.A. 1, 132, 213, 326 (1969).

170. Even if the agreement is otherwise silent on enforcement, it may state that deci-

thorize any partner to enforce.¹⁷¹

- If the enforcement is not an ordinary matter, all partners must enforce or authorize fewer than all the partners to enforce.¹⁷²

The standards are the same, whether a nonpartner defendant (if allowed to object at all) or a nonsuing partner is objecting to the enforcement by fewer than all the partners. However, differences in application of the standards are appropriate. Section 9(1) of the U.P.A. is primarily concerned with partnership and partner relations to third parties including defendants. Sections 18(e), 18(h) and 25(2)(a) are internal governance provisions primarily concerned with relations among the partners and within the partnership. Together these sections justify divergent allocations of the triple burden—of pleading, production of evidence, and persuasion—to nonpartner defendants and to nonsuing partners. A nonpartner defendant, to prevail on the ground that fewer than all the partners have sued, should satisfy the triple burden on one of the following:¹⁷³

- (1) The partnership agreement denies authority of the plaintiff partner(s) to bring the enforcement action; or
- (2) Enforcement is an ordinary matter on which there is partner disagreement and a majority of the partners do not agree with the enforcement action and there is nothing in the partnership agreement to authorize the action; or
- (3) The enforcement action is not an ordinary matter and any partner disagrees with the enforcement action and there is nothing in the partnership agreement to authorize the enforcement action.

Thus, for the nonpartner defendant the lack of capacity or authority of the plaintiff partner(s) is an affirmative defense if that defendant is permitted to raise the issue.

There is no justification for imposing the triple burden on a nonsuing partner who is not a defendant. That partner can appropriately insist on strict observance of the partnership's internal governance provisions. Accordingly, he or she should be entitled to dismissal of the enforcement action if he or she intervenes unless the suing partner meets the triple burden on either of the following:

- (1) The partnership agreement authorizes enforcement by the plaintiff partner(s); or

sions are to be made by a majority in interest or some method other than one vote per partner. The agreement will, of course, control.

171. UNIF. PARTNERSHIP ACT §§ 9(1), 18(e), (h), 25(2)(a), 6 U.L.A. 1, 132, 213, 326 (1969).

172. *Id.* §§ 9(1), 18(e), 25(2)(a), 6 U.L.A. at 132, 213, 326.

173. A third party suing the partnership on the basis of a partner's act has the burden of proof that the act was "apparently . . . usual." See *Stratemeyer v. West*, 125 Ill. App. 3d 597, 602, 466 N.E.2d 306, 309 (1984); *Burns v. Gonzalez*, 439 S.W.2d 128, 132 (Tex. Civ. App. 1969).

- (2) Enforcement is an ordinary matter (the other partner's intervention establishes disagreement) and a majority of the partners favor the enforcement action.

In applying all the foregoing rules a court should consider only the disinterested partners where some partners have a conflict of interest in the enforcement of the right, as opposed to a disagreement about the wisdom of enforcement.

Objections to enforcement by fewer than all the partners should be required early in the pleading stage of litigation, particularly if raised by a defendant. If sustained, the result should be no more severe than dismissal with leave to amend or without prejudice. Early objections, if sustained, may permit joinder of the requisite partners or avoid the running of limitations. Late objections should be overruled or treated as waived.

In the few situations where the prior measures would still not permit enforcement of an apparently valuable partnership right, the courts should allow a derivative suit by any partner.

E. Litigators

Partners, or their counsel, seeking to enforce partnership rights should, of course, ascertain the forum's applicable law on who can enforce the partnership's rights. If all partners must be parties, they should be so named. If fewer than all may sue, in many cases it will be desirable for the suing partners to plead that they sue with authority.¹⁷⁴ It may be desirable to plead details of the authority—for example, authority by the partnership agreement, by specified vote or consent of the partners, or by section 9(1) of the U.P.A.—and underlying facts. Defendants in suits by fewer than all the partners should raise their objections early by motion to dismiss or similar pleading or, at the latest, by answer.

F. Drafters

Since the partnership agreement will control, its drafters (and of course the partners) should give consideration to whether the agreement ought to deal specifically with who has authority to enforce partnership rights. If they do not, the results are uncertain since the U.P.A. is not specific on the matter, the case law is mixed and general provisions in the agreement on power and authority may or may not be interpreted to cover enforcement of partnership rights.

The agreement may give enforcement authority to any partner, a managing partner, a designated committee of partners, a majority of

174. This may be undesirable in a jurisdiction where a general denial requires that plaintiff(s) prove everything in the complaint.

the partners or all the partners unanimously. A majority may be any specified proportion above fifty percent. It may be (and frequently is) measured by profits, capital accounts, points or other designated formula.

Some specific expression of authority is almost always desirable. If litigation is likely to be frequent because of the nature of the partnership business, it is advisable to delegate authority to one (or any one) partner or a small group. If the partners are numerous, it is virtually essential to have a delegation of authority to one or a small group of partners. Even if the partners are few, there are advantages to specifying that any partner may sue for the partnership. Provisions of this kind will facilitate enforcement of partnership rights against third parties.

If the partners prefer to retain a more collective decisionmaking process for each enforcement opportunity yet want to minimize challenges and delays by defendants, a provision of this sort might be written: Any partner has authority to enforce a partnership right or claim unless written objections are filed with a designated person by a majority of the partners.

The partners should also consider whether the agreement ought to limit or deny enforcement authority when a partner will be a defendant and leave that to an action for an accounting.

If enforcement authority is delegated by the agreement, it should specify that the designated person(s) may sue in the partnership name or include all partners as parties (plaintiffs or defendants) if required by applicable law.

